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IN THE

Supreme Court of the United States.

No. 315. October Term, 1949.

AMERICAN EASTERN CORPORATION,
Petitioner,

v.

JEREMIAH McCARTHY,
Respondent.

PETITION FOR REHEARING FOLLOWING DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petition of American Eastern Corporation respectfully prays that this Court shall reconsider its decision handed down November 7th, 1949 [1] denying the original petition for certiorari in the within matter. The Petitioner asks this Court to grant certiorari to review the judgment of the Court of Appeals for the Third Circuit which affirmed a judgment, entered upon the verdict of a jury, against your Petitioner in the sum of $22,500.00 in a suit for personal injuries against your Petitioner by the Respondent.

The question presented was the interpretation of a Federal Statute, 46 U. S. C. A. 688, commonly known and referred to as the Jones Act. More particularly it was whether the words "may at his election maintain an action at law for damages" in that statute did not require the Respondent to elect between his remedies under the Act and his remedy under the General Maritime Law for alleged breach of the warranty of seaworthiness.

[1] An order extending the time to file this petition for rehearing to December 15, 1949 was entered by Mr. Justice Burton on November 18, 1949.

In our original Petition we fear that we did not sufficiently emphasize the importance of the holding by the Court below. We failed to point out that the question of election under the Statute is one which is important not only to parties situated as is the Petitioner, the owner and operator of an American Vessel. It is of transcending importance to the seamen who man all of the ships of the American Merchant Marine. It vitally affects the uniformity of the remedy which these seamen may obtain. Without question the rule in the Second Circuit is that a seaman suing his employer must, at some time before concluding his case, elect between the remedy which the Jones Act grants him to recover for negligence and the remedy which is his by reason of claimed unseaworthiness.

The rule in the Second Circuit is set out in *Skolar v. Lehigh Valley R. Co.*, 60 F. 2nd 893. That case too involved a seaman suing his employer. There the District Court compelled the seaman to elect between those allegations of his complaint relating to unseaworthiness and those allegations of his complaint which sounded in negligence under the Jones Act. There the seaman appealed. The Court of Appeals for the Second Circuit affirmed and held that the seaman could not present his case to the Jury upon both bases, unseaworthiness and negligence. The Court in that case held that under the statute he had to elect between these two "inconsistent" grounds for recovery.

The Opinion by the Court of Appeals in our case recognizes that its rule of "no election" is contrary to the rule of the Second Circuit compelling election. That recognition is no great concession to facts because the Second Circuit has recently indicated its reaffirmance of the doctrine of election in *McGhee v. United States*, 165 F. 2nd 287. There the Court said:

> "We do not mean that a seaman may go to trial on both causes of action (negligence and unseaworthiness) simultaneously, and recover upon one or the

other as the evidence turns out; we said the opposite in *Skolar v. Lehigh Valley R. Co.*, supra."

The Jones Act created for seamen a new cause of action and provided that this modified maritime law could be tried with a jury in the Common Law Courts. *Panama R. Co. v. Johnson*, 264 U. S. 375; *Pacific S. S. Co. v. Peterson*, 278 U. S. 130. Congress did not modify in any way the ancient rights which were the seaman's under the General Maritime Law as set out in this Court's decision in *The Osceola*, 189 U. S. 158. Thus the decision below gives to seamen rights based upon the General Maritime Law which the latter does not give to any other class whose rights are just as "maritime". Stevedores and passengers would be examples. Thus, without any act of Congress a seaman suing his employer for injuries due to unseaworthiness under the General Maritime Law may sue at law whereas a passenger injured in the same occurrence would have to sue in admiralty.

If the latter statement is doubted we refer this Court to *Guerrini v. United States*, 167 F. 2nd 352, where the Court of Appeals for the Second Circuit states in so many words that the employee of someone other than the shipowner who is injured on board the ship must sue in the admiralty if he wishes to take advantage of the admiralty doctrine of unseaworthiness. In the *Guerrini* Case, *supra*, the Court clearly indicated that the law of the State (New York) within whose territorial waters the accident occurred would govern if the suit was in a State Court or upon the civil side of the Federal Court. It said:

> "We held in *Puleo v. H. E. Moss Co.*, 159 F. 2nd 842, that the employee of a sub-contractor engaged in freeing a tanker's piping of gasoline was in the position of a 'business guest', and that the shipowner's liability depended upon the law of New York, the ship being moored to a wharf in this port. In *Riley v. Agwilines, Inc.*, 296 N. Y. 402, 73 N. E. 2d 718, the Court of Appeals of New York pointed out that in so

holding we had ignored several decisions of the Supreme Court which, following *Southern Pacific Co. v. Jensen,* 244 U. S. 205, had held that in cases closely parallel the law of the sea displaced the local law. Whether those decisions are still law depends upon what is left of the whole doctrine of *Southern Pacific Co. v. Jensen, supra,* which has proved to the last degree difficult in application, even in the field of workmen's compensation where it arose. The Supreme Court had for long obviously continued to recognize it at all only with mounting reluctance, *Just v. Chambers,* 312 U. S. 383; *Parker v. Motor Boat Sales Co.,* 314 U. S. 244; *Davis v. Department of Law,* 317 U. S. 249."

Continuing with the same thought in the same Opinion, the Court of Appeals in the *Guerrini* Case said:

"As we said in that case, the New York decisions appear not to distinguish the measure of care due to a 'business guest' from that due from his employer to an employee; and, if so, a failure to use reasonable care to provide for the 'guest's' safety is a breach of duty, even though the danger be apparent. At times opinions have read as though the duty was limited to pointing out the dangers and not including any affirmative provision for the safety of the 'guest' while on the premises. It is not surprising that this ambiguity should arise, because practically it makes no difference, since even though the owner's duty be the broad one, contributory negligence or assumption of risk is an absolute bar. *However, in a suit in the admiralty the distinction becomes important,* because if the shipowner owes a positive duty to provide a safe place, regardless of the openness of the danger, the 'guest's' contributory negligence is not a bar, but only goes in mitigation of damages. This is as true when no statute so provides as when one does. *Moreover, whether the*

defense is total or partial, depends upon the forum.[16] (Emphasis ours.)

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[16] *Atlee v. Union Packet Company,* 21 Wall. 389, 395, 396, 22 L. Ed. 619; *Belden v. Chase,* 150 U. S. 674; *Johnson v. United States Shipping Board Emergency Fleet Corporation,* 24 F. 2nd 963; *In re Pennsylvania R. Co.,* 48 F. 2nd 559, 565, 566."

We respectfully point out to this Court that in the *Guerrini* Case the Second Circuit has reaffirmed the doctrine of *Belden v. Chase, supra,* and other cases cited in footnote 16 of the *Guerrini* Opinion.

So long as Courts cite *Belden v. Chase, supra,* there is confusion as to whether a suit instituted in a state court upon a cause of action which arose upon navigable waters is controlled by the rules of admiralty or the common law rules. So long as Courts say "in a suit *in the admiralty* the distinction becomes important" there is no uniformity of understanding as to the rule which applies. The Court of Appeals for the Third Circuit has treated the case at bar in a manner altogether different from the treatment the same case would have received in the Second Circuit, and the State Courts of New York, California, (*Vargas B. Pope & Talbot, Inc.,* 1948 A. M. C. 904) and Washington, (*Wilkins v. Foss Launch and Tug Company,* 1944 A. M. C. 759). Judging from the rationale of decisions, it was treated differently in the Third Circuit than it would have been in the Fifth, *Smith v. Lykes Bros.-Ripley S. S. Co.,* 105 F. 2nd 604, and the First Circuit, *McDonald v. Cape Cod Trawling Corporation,* 71 F. Supp. 888.

The Respondent in the case at bar was suing upon the civil side of the District Court because the Jones Act gave him the right to do so. He also had the right, under the Judicial Code, to pursue in that Court his "common law remedy". That does not mean he could pursue his admiralty remedy in the common law court unless this Court is prepared to say that the right to recover damages for

unseaworthiness is a "common law remedy". Cf. *Caldarola v. Eckert*, 332 U. S. 155.

In the original Petition and brief filed in this case we cited and relied heavily upon *Pacific S. S. Co. v. Peterson*, 278 U. S. 130. In No. 452, this term, McCarthy, the Respondent in the case at bar, has himself asked for certiorari on another phase of this same case. McCarthy's entire Petition is based upon the proposition that the Court below failed to apply the doctrine of the *Peterson* Case properly. So we have a situation where opposing parties both cite and rely upon a decision by this Court in support of diametrically different legal concepts. We respectfully suggest that when such a situation as this arises the time is ripe for this Court to bring the matter before it and decide the rule of law to be followed. The legal principle and its effect upon the rights of seamen and their employers throughout the Country transcends the importance of the particular case. We respectfully suggest that whether Mr. McCarthy, the Respondent here, may have to try his case a second time is by no means as important as that seamen and their employers everywhere shall know whether their rights are different in Pennsylvania than they are in New York or whether the seaman who is fortunate enough to be able to invoke Federal Jurisdiction as to both negligence and unseaworthiness has rights different from the seaman who cannot invoke Federal Jurisdiction as to unseaworthiness because of lack of diversity. We respectfully submit that because the Respondent here may eventually recover a verdict anyway and that some might even regard the point as moot should not militate against review by this Court. This is so because the Court of Appeals has reaffirmed a rule of law which sets the Federal Courts within the third circuit apart from other State and Federal Courts where seamen's personal injury suits are most often tried. The Court below having reviewed the problem we submit that this Court should review it for the reasons herein together with those set out in the original Petition.

The Principle of Southern Pacific Co. v. Jensen, Supra, Was Reaffirmed by the Decision Below Even Though This Court Has Said That It "Has No Vitality Beyond That Which May Continue as to State Workmen's Compensation Laws.[2]

This Court has restricted the doctrine of the *Jensen* Case in *Just v. Chambers,* 312 U. S. 383; *Parker v. Motor Boat Sales, Inc.,* 314 U. S. 244; *Davis v. Department of Labor and Industries of Washington,* 317 U. S. 249; and *Standard Dredging Corporation v. Murphy,* 319 U. S. 306. The *Jensen* Case arose when an attempt was made to apply a State Workmen's Compensation Act to an injury which occurred upon navigable water. For the first time this Court then promulgated the doctrine of uniformity. Events subsequent to Jensen indicate rather clearly that the doctrine which arose in a workmen's compensation case applied to every piece of litigation having any basis whatever in matters maritime. It has often been suspected by the Bench and Bar that the *Jensen* Doctrine is something which, like the family skeleton, was best ignored whenever possible. When it was impossible to ignore it a series of judicial amputations was performed upon it until Mr. Justice Black, for an unanimous Court, said that it had no vitality beyond its application to the compensation laws.[2]

It is plain from the *Guerrini* Decision that the Court of Appeals for the Second Circuit has, as we submit it should, interred the *Jensen* Decision. Yet the Court of Appeals for the Third Circuit necessarily followed *Jensen* when it held that the Respondent's cause of action for damages based upon unseaworthiness was justiciable upon the civil side of a Federal District Court as part and parcel of a case based upon the Jones Act. Certainly the *Jensen* Case should not be permitted to remain in the reports side by

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[2] *Standard Dredging Corporation v. Murphy,* 319 U. S. 306.

side with *Belden v. Chase, supra.* Able Judges (Holmes, Pitney, Brandeis and Clarke) dissented in *Jensen* and thereafter frequently noted their disapproval of its doctrine.

It requires only an examination of the cases decided prior to the Merchant Marine Act of 1915, to find that all causes of action by seamen or others against shipowners were cases where the admiralty jurisdiction of the Federal Court had been invoked.

The representatives of the seamen's unions who introduced the Jones Act in the United States Senate and testified in support of its passage had no desire that both possible causes of action should be tried together. They wanted to give the seaman the right to elect so as to avoid the result which had occurred in *Chelentis v. Luckenbach Steamship Company, Inc.*, 247 U. S. 372. There the suit had been upon the law side and the injured seaman had been denied recovery. The representatives of the seaman desired to have his remedy for unseaworthiness in admiralty and his Jones Act remedy upon the civil side *when he so elected.* See HEARINGS BEFORE THE COMMITTEE ON COMMERCE, UNITED STATES SENATE, 66th CONGRESS, FIRST SESSION, page 1709, STATEMENT OF ANDREW FURUSETH and HEARINGS BEFORE THE COMMITTEE ON MERCHANT MARINE AND FISHERIES, HOUSE OF REPRESENTATIVES, 64th CONGRESS, 2nd SESSION, PAGE 42, STATEMENT OF SILAS B. AXTELL.[3]

Conclusion.

We realize how infrequently this Court grants rehearing after it has once denied certiorari. We fear that in our desire for brevity in our original Petition we failed to point out to the Court the fundamental and great importance of the question which this case presents to the problem of securing uniformity in causes of action having

[3] For the convenience of the Court the excerpts from the Committee Hearings to which we refer are printed as an Appendix to this Petition.

their roots in Maritime Law. We respectfully point out to this Court that even the decision which we ask this Court to review recognizes that there is conflict between the Circuits and that the very able counsel representing the Respondent inferentially conceded as much and filed no brief in opposition to our Petition. In fact this Respondent, seeking certiorari on another phase of this same matter, No. 452, this term, cites in support of his own Petition the same cases which the Petitioner and the Court below rely upon in concluding that the decision by the Court of Appeals in this case is in conflict with prior decisions of this Court.

We respectfully urge this Honorable Court to reconsider its Order of November 7th, 1949 denying certiorari. We urge that it grant certiorari and bring the case on for hearing so that this Court may bring order out of what is now conflict and chaos in the lower Courts.

Respectfully submitted,

THOMAS E. BYRNE, JR.,
Counsel for Petitioner.

TIMOTHY J. MAHONEY, JR.,
KRUSEN, EVANS & SHAW,
Of Counsel.

I hereby certify that the within Petition for Rehearing is filed in good faith and not for purposes of delay.

THOMAS E. BYRNE, JR.,
Counsel for Petitioner.

APPENDIX.

UNITED STATES SENATE HEARINGS.

ESTABLISHMENT OF A MERCHANT MARINE.

Hearings before the Committee on Commerce, United States Senate, Sixty-Sixth Congress, First Session

Friday, February 27th, 1920

Wesley L. Jones, Presiding

Statement of Mr. Andrew Furuseth, p. 1709.

"MR. FURUSETH: There is another section to this, the amendment section. § 10 of the Seamen's Act provides that in any suit to recover damages for any injury sustained on board vessels or in its service, seamen having command shall not be held to be fellow servants with those under their authority. The Superior Court in the Chelentis Case held that that was meaningless because it had reference to the common law, and the common law had no jurisdiction on board a ship, and so, we will have to, after fifteen years of following the common law, in this decision we have got to change all that, and now here is the Supreme Court decision in the case of Chelentis v. The Luckenbach Steamship Co. (Inc.)"

(Here follows text of Opinion, 247 U. S. 372.)

At p. 1712—continued

"THE CHAIRMAN: What is the amendment you suggest to § 20?

MR. FURUSETH: That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the

right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply. And in the case of the death of any seaman as the result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. That is the amendment.

SENATOR FLETCHER: In other words, under the common law if a sailor should step through an open hatch that had been left carelessly open, he would have no remedy?

MR. FURUSETH: He would have no remedy.

SENATOR FLETCHER: And now you want to change that so he would have a remedy, provided his own negligence did not bring about the injury?

MR. FURUSETH: That is it exactly.

SENATOR CHAMBERLAIN: The fellow servant doctrine does not apply to that?

SENATOR NELSON: Does that law abolish the fellow servant's rule?

SENATOR CHAMBERLAIN: It does not exist in admiralty, I think.

SENATOR NELSON: And does it abolish the assumption of risk?

SENATOR FLETCHER: I think it does.

SENATOR NELSON: The assumption of risk in the fellow servant's rule goes to the vital rules.

SENATOR FLETCHER: Yes.

MR. FURUSETH: With those two, § 4 and § 11, it puts it straight if we can get §§ 13 and 14 enforced—and there is

some hope of it now, I suppose; we have got a new Secretary of Commerce. We have now got some hope of it.

SENATOR NELSON: I would suggest to your amendment to § 20 in line 17 that you transpose the words "at law" and have them inserted after action, so it would read "maintain an action at law for damages".

MR. FURUSETH: Well, that is all right.

SENATOR NELSON: Instead of an action for damages at law.

MR. FURUSETH: Of course, that is a matter to take care of, that § 20 there to take care of seamen after they are on board of a vessel."

PERSONAL INJURY SUITS BY SEAMEN.

Hearings before the Committee on Merchant Marine and Fisheries, House of Representatives,

Sixty-Fourth Congress, Second Session
on
H. R. 8916, H. R. 12454

May 5th, 1936

Silas B. Axtell, p. 42.

"THE CHAIRMAN: When you refer to the Jones Act, will you please be a little more specific?

MR. AXTELL: We refer to the Railway Servant's Act. It is the same Railway Servant's Act that was passed in 1904, declared unconstitutional, amended, and sustained by the Supreme Court in the *Railway Servant's Act Cases* in 1906; by the Chelentis Decision of the Supreme Court in 1917, on § 20 of the Seamen's Act, in which they said that Congress had voted to effect the remedy sought. The Jones Act was passed. Mr. Justice Sutherland, then ex-Senator from Utah, was counsel to the seamen, acting gratuitously as adviser, of course. And even the right of a jury trial was in jeopardy. As one of counsel, I insisted upon the writing in of the words that the seaman should have the right of election of a jury trial which has been the cause of considerable confusion on the part of judges since then; but its origin will be found in the decision of the Circuit Court of Appeals of the Third Circuit, in the case of *Berg v. Philadelphia Railroad,*[4] decided about 1919."

[4] 266 F. 591, affirmed 274 F. 534, cert. den. 257 U. S. 638.